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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CASSANDRA M. MENOKEN,
PETITIONER,

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CASSANDRA M. MENOKEN
Attorney at Law and
Pro Se Petitioner

215 Seaton Pl., N.E.
Washington, D.C. 20002
(202) 269-3465

QUESTIONS PRESENTED

This is an action challenging the termination of a federal employee. The termination was the direct result of a 1981 reduction in force which was improperly implemented by the Department of Health and Human Services (the Department). The reduction in force was initiated in connection with the transfer of functions from the Community Services Administration (CSA) to the Office of Community Services (OCS), which is an operating division within the Department. Both the Merit Systems Protection Board (the Board) and the United States Court of Appeals for the Federal Circuit found, as a matter of fact and law, that the Department's 1981 reduction in force failed to comply with controlling regulations. Nevertheless, despite the showing

of specific harm to the substantive rights of the petitioner, both the Board and the Court of Appeals upheld her termination. Indeed, the Court of Appeals went further by explicitly sanctioning the legally deficient procedure by which the petitioner and numerous other employees were terminated by the Department in 1981. It is in this context that the following questions are presented:

1. Whether the Court of Appeals erred in its failure to require the Department to properly determine petitioner's retention rights.

2. Whether the Court of Appeals erred in sanctioning an Executive Branch agency's failure to comply with regulations governing the implementation of a reduction in force.

3. Whether an Executive Branch agency violates 5 U.S.C. § 3503(a) when it terminates an employee with transfer rights and assigns that employee's duties to individuals with no transfer rights.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties in the proceeding below.

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Petitioner, Cassandra M. Menoken, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit entered on February 18, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 784 F.2d 365 and is attached hereto as Appendix (App.) A. The decision of the Merit Systems Protection Board, from which review by the Court of Appeals was sought, is unreported and attached hereto as App. B.

RELATED PROCEEDINGS

The issues raised in this petition overlap with issues raised and decided in the related case of Certain Former CSA Employees v. Department of Health and Human Services. The Court of Appeals opinion in that case is reported at 762 F.2d 978 and is attached hereto as App. C. The decision reviewed by the Court of Appeals in that case was rendered by the Merit Systems Protection Board. The opinion of the Mer-

it Systems Protection Board is reported at 21 M.S.P.R. 379 (1984) and is attached hereto as App. D.

JURISDICTION

The Court below issued a decision on February 18, 1986. App. A. On April 11, 1986 the Court denied a timely petition for rehearing. App. E. On April 28, 1986 the Court denied a timely suggestion for rehearing en banc. App. F. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED *

1. 5 U.S.C. § 3503(a)(1982):

> When a function is transferred from one agency to another each competing employee employed in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

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* Denotes a rule that is cited here only because it is inexplicably relied upon by the Court of Appeals.

2. 5 C.F.R. § 351.302(a) (1981):

> Before a reduction in force is made in connection with the transfer of any or all of the functions of a competitive area to another continuing competitive area, each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.

3. 5 C.F.R. § 302(c) (1981)*:

> Regardless of an employee's personal preference, an employee has no right to transfer with his or her function unless the alternative in the competitive area losing the function is separation or demotion.'

4. 5 C.F.R. § 351.303(e)(2) (1981):

> If the total number of employees who volunteer for transfer exceeds the total number of employees required to perform the function in the competitive area that is gaining the function, the losing competitive area should give preference to volunteers with the highest retention standing.

5. 5 C.F.R. § 351.601(b) provides:

> An agency may not release a competing employee from a competi-

tive level while retaining in that level an employee with lower retention standing.

6. 5 C.F.R. § 351.703 (1981)*:

(a) An agency shall assign under § 351.603 a group I or II employee in a position in the competitive service, rather than furlough or separate him, to a position in the competitive service in another competitive level in his competitive area which requires no reduction in representative rate when a position in the other competitive level is held by an employee:

(1) In a lower subgroup or
(2) With lower retention standing in a position from which the group I or II employee was promoted or an essentially identical position.

Each employee's assignment rights shall be determined on the basis of the pay rates in effect on the date of issuance of specific notices of reduction in force, except that when it is officially known on the date of issuance of notices that new pay rates have been approved and will become effective by the effective date of the reduction in force, assignment rights shall be deter-

mined on the basis of the new pay rates.

STATEMENT OF THE CASE

Petitioner was involuntarily separated from the Community Services Administration (CSA) on September 30, 1981 and not accepted for transfer to the Department of Health and Human Services (Department). The factual background leading up to the dissolution of CSA and the transfer of that agency's functions to the Department is undisputed and adequately set forth in a decision of the Court of Appeals in a related matter, Certain Former CSA Employees v. Department of Health and Human Services, 762 F.2d 978 (Fed. Cir. 1985). App. C. In that decision, the Court of Appeals affirmed a June 18, 1984 Opinion and Order of the Merit Systems Protection Board (Board) which found that

the Department was "remiss" in its duty to conduct a reduction in force, in connection with the transfer of functions, in a manner consistent with governing regulations found at 5 C.F.R. Part 351. Certain Former CSA Employees v. Department of Health and Human Services, 21 M.S.P.R. 379 (1984). App. D. The Court of Appeals also upheld the mechanism established by the Board to determine whether the substantive rights of any former CSA employees had been adversely affected by the Department's illegal implementation of the reduction in force. It was pursuant to that mechanism that a hearing was held regarding petitioner's individual appeal of her termination. In that hearing the following facts were established through undisputed evidence:

1. That petitioner, while an employee at CSA, performed duties and responsibilities identified with functions which transferred to the Department. Stipulation 24a;

2. That despite petitioner's rights under 5 U.S.C. § 3503(a), the Department failed to accept petitioner for employment when her functions transferred;

3. That petitioner was qualified to perform all of the attorney positions established in the Department's Office of Community Services (OCS) Trans. 19;

4. That the Department accepted for transfer at least one former CSA employee whose retention rights were inferior to that of the petitioner Trans. 21-22;

5. That the Department abolished petitioner's position at CSA and assigned her former duties and responsibilities to individuals who were not former CSA employees Trans. 22-23;

Despite the evidence establishing the foregoing facts the Board affirmed petitioner's termination. The Board made no attempt to ascertain what petitioner's

retention standing would have been if the Department had implemented the reduction in force in accordanc with controlling regulations found at 5 C.F.R. Part 351. In affirming petitioner's termination the Board cited as authority, 5 C.F.R. §§ 302 (c) and 703. The referenced regulations have no relevance to any issue raised by the petitioner's appeal. The petitioner sought review in the United States Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. § 7703. The Court of Appeals upheld the Board's misreliance on 5 C.F.R. § 351.302(c) and 703, but failed to explain how or why the referenced regulations are pertinent to the issue of whether the petitioner would have survived a properly implemented re-

duction in force. Indeed, the Court of Appeals went further and explicitly sanctioned the legally deficient procedure by which petitioner and numerous other CSA employees were terminated. See App. A-18.

The Department Violated Petitioner's Rights Under 5 U.S.C. § 3503 (a)

Section 3503(a) of Title V of the United States Code provides:

> When a function is transferred from one agency to another each competency employee in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

It is therefore clear that in 1981, when the Department assumed the functions of CSA, it was under a statutory duty to appoint former CSA employees, who were associated with the transferred functions, to positions for which they qualified before appointing any non CSA employee to such positions. It is undisputed that all CSA employees, including petitioner, were associated with transferred functions in 1981. It is also undisputed that the Department terminated petitioner as a result of the transfer, while it assigned her duties to at least two identified individuals from the Department of Justice

(DOJ), and numerous other unidentified individuals in the Department's Office of General Counsel. Trans. 50. Such maneuvering strikes at the very heart of 5 U.S.C. § 3503(a), the primary purpose of which is to "protect employees in the transferring agency from being 'squeezed out' in the wake of a transfer of function." Ross v. United States, 566 F. Supp. 1024, 1027 (D.D.C.1984). Not only did the Department effectively "squeeze" petitioner out of her position by assigning her duties to non CSA employees, as the following discussion demonstrates, the Department also ignored petitioner's retention rights relative to that of other CSA employees.

The Department Violated Petitioner's Rights Under 5 C.F.R. Part 351.

Regulations found at 5 C.F.R. § 351.303(e)(2) provide:

> If the total number of employees who volunteer for transfer exceeds the total number of employees required to perform the function in the competitive area gaining the function, the losing competitive area should give preference to volunteers with the highest retention standing.

In the instant matter, CSA (the losing competitive area) made no effort at all to ascertain the relative retention standing of CSA employees who sought to be transferred to the Department (the gaining competitive area). CSA merely terminated all employees on September 30, 1981. It was subsequent to that date that the Department, pursuant to a district court order, finally undertook to appoint former CSA employees to positions in OCS. However, as previously pointed out, the Department's efforts in that regard failed to comply with the requirements of 5

C.F.R. Part 351. For example the Court of Appeals, in a related matter, found:

> [The Preference Order Master Lists] did not satisfy the requirements of traditional reduction in force registers since they did not show the competitive levels of each employee . . . and there were no separate retention registers for each competitive level.
>
> Accordingly, there may have been some former Community Services Administration employees who were not given jobs with the Office of Community Services to which they would have been entitled if the Community Services Administration had conducted a proper reduction in force.
>
> The remand procedure that the Board adopted in this case is designed to enable individual employees who are in that position to obtain the jobs that they should have obtained.

Certain Former CSA Employees v. Department of Health and Human Services, 762 F.2d 978, 984 (Fed. Cir. 1985). At petitioner's

individual hearing before the Board, the Department made no effort to rectify its failure to establish proper competitive levels. The evidence nevertheless establishes that the GS-14 attorney positions and the GS-15 attorney positions in OCS should have been classified at the same competitive level because there was no meaningful difference between the two positions other than the grade. 5 C.F.R. § 351.405; Appellant's Exhibits 3, 4, 5 and 6. The evidence further establishes that petitioner was qualified for all of the attorney positions in OCS, irrespective of the grade levels assigned to such positions. It is significant that the Department never disputed petitioner's qualifications in that regard. The grade level assigned to each attorney appointed to OCS was merely reflective of the grade

level held by that individual prior to the reduction in force. Indeed, the Department's own witness acknowledged that it was possible that those individuals were actually working in OCS before the Department even prepared position descriptions for them. Trans. 65. It is therefore clear that the fact that petitioner was classified as a GS-14, prior to the reduction in force, did not, as held by the Court of Appeals, automatically render her unqualified for an attorney position in OCS.

The record reflects that the Department did not dispute the fact that it appointed a tenure group IIB employee to an attorney position in OCS. Petitioner is a tenure group IB employee. It is well established that the retention rights of a tenure group IIB employee are infer-

ior to that of a tenure group IB employee. 5 C.F.R. § 351.501(a)(1) and 502. The Department's retention therefore of one John Meyers, over the petitioner, demonstrated a blatant disregard of petitioner's rights as established by 5 C.F.R. § 351.601(b) which provides:

> An agency may not release a competing employee from a competitive level while retaining in that level an employee with lower retention standing.

There can be no question that, given the foregoing irregularities, the Department, at the very least, had a duty to prove, by a preponderance of the evidence, that the petitioner would not have survived a properly implemented reduction in force. Hill v. Department of Commerce, 1984 FMSR ¶84 6086 (MSPB December 11, 1984); Losure v. ICC, 2 MSPB 361 (1980). The Department, however, made absolutely

no effort in that regard. Such failure was improperly sanctioned by the Court of Appeals through its explicit "approval" of the Department's legally deficient reduction in force procedure. App. A-18-19.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals is Inconsistent with an Applicable Decision of this Court

The primary reason that the Court should grant this petition is to require the Court of Appeals to follow the principles enunciated in this Court's decision in the case of Vitarelli v. Seaton 359 U.S. 535 (1959). A brief review of the facts and holding in Vitarelli, will reveal the clear nature of the error committed by the Court of Appeals in the case at bar.

Mr. Vitarelli was an employee of the Interior Department. The Secretary of the

Interior undertook to terminate him on grounds of national security. However, in so doing there was a failure to comply with regulations governing the termination of employees on such grounds. Finding Mr. Vitarelli's termination procedurally defective, this Court held the termination to be null and void and ordered reinstatement and backpay. The Court reasoned:

> Since ... the Secretary [of Interior] gratuitously decided to give a reason [for Vitarell's discharge], and that reason was national security, he was obligated to conform to the procedural standards he had formulated ... for the dismissal of employees on security grounds.

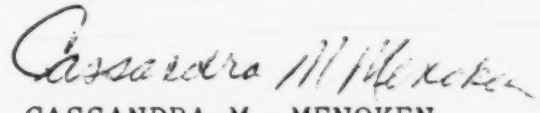
The reasoning and result in Vitarelli clearly apply to the facts in this case. Just like Mr. Vitarelli, petitioner and approximately 900 other CSA employees, were terminated pursuant to a procedure which fell substantially short of what was

required by applicable regulations. Arguably, the Court of Appeals, upon finding the Department remiss in its duty to conduct a properly implemented reduction in force, could have and indeed should have, ordered reinstatement and backpay to all CSA employees who were illegally terminated. Therefore, there can be no question that the Court of Appeals was certainly required to order such relief to the petitioner upon a showing that her substantive rights were violated by the Department's retention of several individuals whose rights to continued employment were inferior to hers. Through its "approval" of the Department's improper actions, the decision of the Court of Appeals in effect sends the message that federal agencies and departments will not

be held accountable for their noncompliance with binding regulations -- even when such noncompliance results in substantial harm to the legitimate rights and expectations of federal employees. Such a message clearly contradicts that which this Court sought to send in Vitarelli, supra.

For the foregoing reasons, petitioner respectfully prays that the writ herein be granted and the case be set down for plenary consideration by the Court.

Respectfully submitted,



CASSANDRA M. MENOKEN
Attorney at Law and
Pro Se Petitioner

215 Seaton Pl, N.E.
Washington, D.C. 20002

(202) 265-3465